

# SUMMARY OF THE JUDGMENT

## HALF TRUTHS RENDER TENANT LIABLE FOR LANDLORD DAMAGES

### Superstrike Investments 53 (Pty) Ltd v Siyakha Management Services (Pty) Ltd and Others (2006/2035) [2015] ZAGPJHC 78 (29 April 2015)

*During lease agreement negotiations, the prospective anchor tenant intimated that it was a Fruit & Veg City franchisee and instructed the landlord to erect premises to Fruit & Veg's specifications. When the franchise director of Fruit & Veg objected to the location of the intended store, it transpired for the first time that this consent was a prerequisite for the tenant contracting. In the ensuing litigation, the court was asked to determine whether there was a fraudulent misrepresentation rendering the tenant liable for damages suffered as a result of the cancellation of the lease agreement. The outcome illustrates the risks of not playing open cards.*

The Judgment can be viewed [here](#).

### FACTS

Superstrike Investments 53 (Pty) Ltd (Superstrike) was the developer of the Palm Springs Mall in the Orange Farm area.

Shoprite Checkers was the anchor tenant in the first phase of the development and Superstrike was looking for an anchor tenant in the second phase development.

In June 2006 an offer to lease was concluded between Superstrike and Siyakha Management Services (Pty) Ltd (Siyakha). This document reflected the tenant as Siyakha, trading as Fruit & Veg City and, amongst other things, Siyakha confirmed that (i) Fruit & Veg approved the site for trading and (ii) that Superstrike was instructed to proceed with building the store as per the specifications given to it.

Some two weeks later the lease agreement itself was signed. It too provided that the shop will trade as a Fruit & Veg and that its permitted use was the sale of fresh fruit and vegetables, fresh milk, fresh juice, pasta and related items, dry fruits and nuts and dry spices. (Superstrike first had to obtain permission from Shoprite Checkers to waive their exclusivity to sell food and to allow Superstrike to put approximately 1000 m<sup>2</sup> at the disposal of Fruit & Veg in phase 2 of the mall.)

At the time, however, Siyakha was not in possession of a franchise agreement from Fruit & Veg granting it the right to open and trade as a Fruit & Veg store in that mall. Despite no mention being made hereof, one Mr Coppin, the Franchise Director of Fruit & Veg, first

had to approve the location of the shop before Siyakha would be entitled to trade as a Fruit & Veg.

Mr Coppin only visited the mall after the lease agreement was signed, prompted by an e-mail from Superstrike's rent co-ordinator regarding specifications, which was the first Coppin heard of the lease. He explained that Siyakha was in fact granted the franchise to open a store in the general Orange Farm area. The relationship between Fruit & Veg and Siyakha was however that Coppin (in his position as Franchise Director of Fruit & Veg) would not allow a franchisee to open a store if he was not satisfied that the store would be in a favourable location.

Coppin's inspection found the location unsuitable for a Fruit & Veg store and he confirmed this in an e-mail to Superstrike. He also informed Siyakha. As a result, Superstrike contacted Siyakha to cancel the agreement as it was clear that Fruit & Veg would not open a store in the mall. (Siyakha was in effect unable to perform in terms of the lease agreement, which constituted an anticipatory breach of the contract.)

Superstrike and Siyakha then concluded an agreement of cancellation, containing only the following two clauses (necessary in order to claim back from SARS the stamp duties paid in respect of the lease):

- "1. On the 15th June 2006 an Agreement of Lease was entered into between the above parties.*
- 2. It has been mutually agreed that the lease be cancelled with immediate effect."*

The cancellation agreement did not expressly or otherwise provide that it was in full and final settlement. Siyakha subsequently testified that it would not have signed the agreement had he been made aware of the fact that Superstrike intended to sue it for misrepresentation.

Superstrike then sued Siyakha for damages arising from the cancellation of the lease agreement. It alleged that:

- Siyakha expressly orally represented that it was the franchisee of Fruit & Veg and could rightfully conduct a Fruit & Veg shop from the premises;
- the representation was made with the intention to induce Superstrike to enter into the offer to lease and the lease agreement which Superstrike did, to its detriment;
- as a result of the misrepresentation, Superstrike became entitled to cancel the lease agreement and indeed did so;

- the representation was, to the knowledge of Siyakha, false in that it was aware of the fact that it was not the franchisee of Fruit & Veg and that Fruit & Veg had not pre-approved the premises.

HELD:

***What was represented to Superstrike?***

- When the offer to lease was concluded, it was conveyed that Fruit and Veg have approved “the site” for trading purposes. This representation was reinforced by the fact that Siyakha then specifically instructed the landlord to proceed with the building of the store as per the specifications. This representation was repeated in the lease agreement where Siyakha signed the lease again expressly conveying that it will trade as a Fruit & Veg. Specific reference was also made in the attachments to Fruit & Veg Architectural specifications which could not leave any doubt on the side of Superstrike that Siyakha intended to trade as a Fruit & Veg and that they had the necessary authority to do so.
- It was further clear from the evidence that Siyakha knew from past experience that it did not have the authority to open a Fruit & Veg store without the go-ahead of Coppin. This it also mentioned in an e-mail to the letting agent initially involved in the transaction.
- Superstrike was however not made aware of this supplementary requirement and the lease agreement was not made subject to such requirement being fulfilled.
- In the circumstances, any reasonable person reading the lease agreement would have been entitled to accept that Siyakha had the necessary authority from Fruit & Veg to open a shop and trade under the brand name of Fruit & Veg.
- It was further accepted that the intended Fruit & Veg shop would have been an anchor tenant and that the lease of the various line shops was concluded on the back of the lease agreement with the defendants. As such Superstrike testified that it would not have signed the lease agreement if Siyakha intended to trade under another brand name, nor would it have signed if it had known that Siyakha did not have the necessary approval from Fruit & Veg.

***Was the representation fraudulent or intentional?***

- A representation is fraudulent if it is false and made knowingly, without an honest belief in the truth of the statement, or made recklessly.

- On a consideration of the facts, the court held that the representation was intentional. Siyakha made a false statement prior to the conclusion of the contract and later repeated it in the option to lease and the lease agreement.
- On the evidence it was not shown that Siyakha had an honest belief that it would be able to obtain permission from Coppin to open the Fruit & Veg store. At the very least, it knew from past similar experience that there was a very definite possibility that Coppin would not approve of the shop. It nonetheless chose not to disclose to Superstrike that its authority was conditional upon the go-ahead from Coppin. At the very least, there was a duty on Siyakha to disclose this material fact to Superstrike. It not only did not do so, but went further and instructed Superstrike to continue with the construction of the shop.
- By representing that the business to be operated from the premises would be a Fruit & Veg City store, Siyakha implied that it was lawfully able to do so. This representation was false and Siyakha knew that it was false and the false representation induced Superstrike to conclude the lease agreement.

In these premises, the court concluded that the representations were fraudulent, and that there was an intention to induce Superstrike to enter into a lease agreement. The fraudulent misrepresentation was material and Siyakha was held liable for the damages suffered by Superstrike as a result of the cancellation of the lease agreement.

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